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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

LOUIS O. FROST, JR.
PUBLIC DEFENDER

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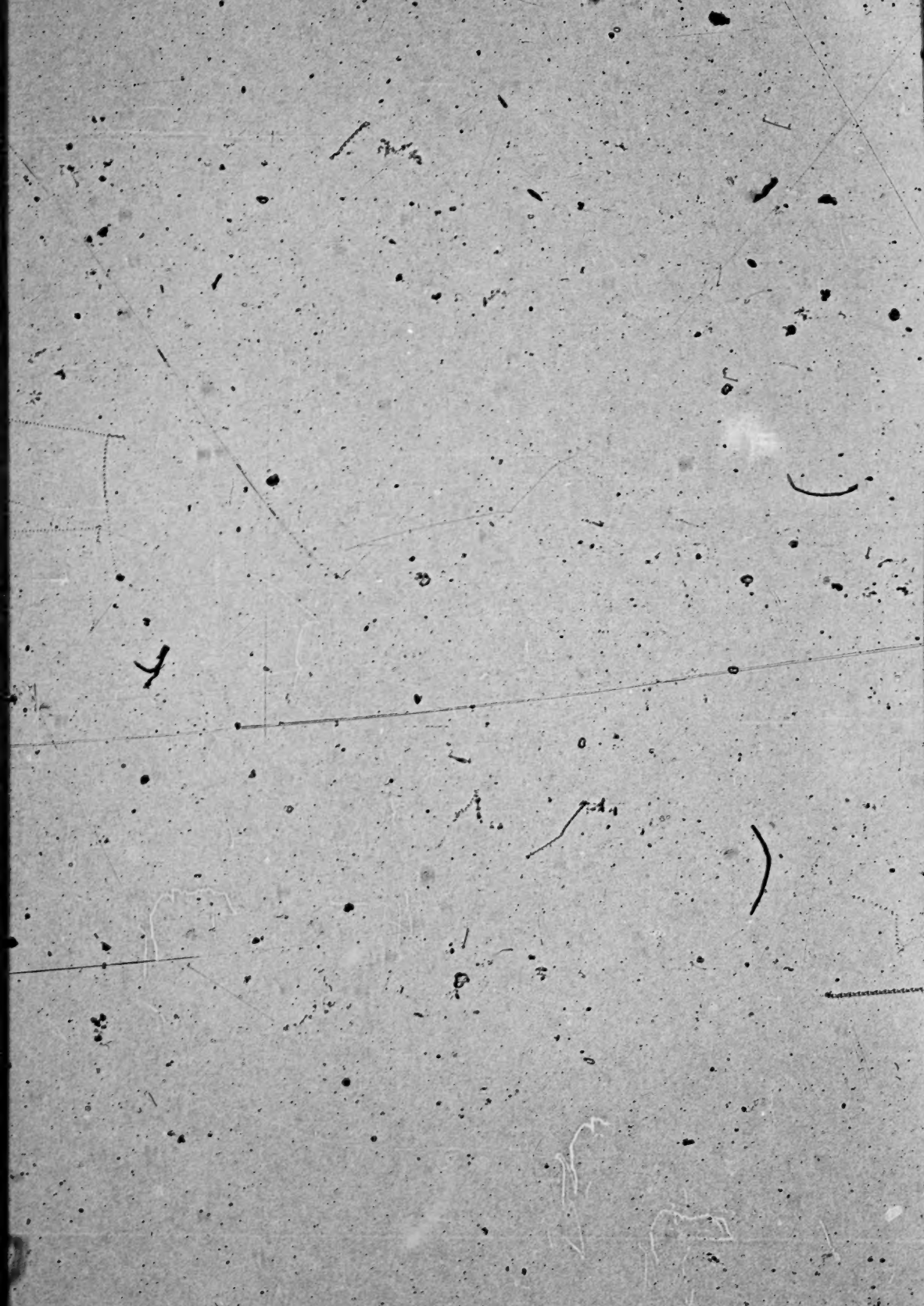
For Petitioner



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Macio Bernard Simpson, petitioner, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District, State of Florida, entered in Case No. M-259, on August 4, 1970.

Citations to Opinions Below

The judgment and sentence of the Criminal Court of Record of Duval County, Florida, entered August 26, 1969, (App. 1) is unreported. The opinion and judgment of the District

Court of Appeal, First District, State of Florida, (App. 2) is reported at 237 So.2d 341. The order of that Court denying rehearing, which is the actual portion of the judgment relevant to this petition (App. 2) is also reported at 237 So.2d 341. The order of the Supreme Court of Florida denying petitioner's timely petition for writ of certiorari to the District Court of Appeal, First District (App. 5), is reported at 240 So.2d 645.

Jurisdiction

The judgment of the District Court of Appeal, First District, State of Florida, a court of final appellate jurisdiction in Florida, *Callender v. Florida*, 383 U.S. 270 (1966), was entered on May 14, 1970. Petitioner's timely petition for rehearing was denied August 4, 1970. Petitioner's timely application to the Supreme Court of Florida for writ of certiorari was denied on October 30, 1970. This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1257 (3).

Question Presented

Whether the District Court of Appeal, First District, State of Florida, can refuse to follow the collateral estoppel doctrine as elucidated by this Court in *Ashe v. Swenson*, 25 L.ed 2d 469, by reasoning: A prior conviction (despite reversal and judgment of not guilty upon retrial) creates collateral estoppel in favor of the State, and thereby nullifies *Ashe's* application at the third trial.

Constitutional Provisions Involved

This case involves an asserted right, privilege or immunity secured to petitioner by the Fifth Amendment to the Constitution of the United States, which provides in relevant part,

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Statement of the Case

Simpson allegedly robbed two persons simultaneously. He was tried for robbing one of the victims and convicted. This conviction was reversed on appeal because the trial court refused to give a requested instruction on a lesser included offense. Upon retrial Simpson was acquitted.

Simpson was then charged with robbing the second victim. Timely motions were filed raising double jeopardy, res judicata and collateral estoppel (App. 5, 6). These were denied. Simpson was convicted at the third trial and sentenced to thirty years imprisonment.

In all three trials the only issue was the identity of the robber.

Simpson appealed to the District Court of Appeal, First District, State of Florida, raising, by assignment of error, brief and oral argument, the issue of collateral estoppel as elucidated by *Ashe*. The conviction was affirmed. Certiorari was denied by the Supreme Court of Florida.

Reasons for Granting the Writ

The District Court of Appeal, First District, states ". . . By its decision in *Ashe*, the United States Supreme Court amended the Fifth Amendment . . ." but concedes ". . . At first blush the case at bar seems to be on all fours with the circumstances presented in *Ashe*, and thus the doctrine of collateral estoppel superficially appears appropriate to this case."

However, the District Court of Appeal then reasons: (1) Collateral estoppel inures to the benefit of the State as well as the defendant. (2) Although Simpson could claim collateral estoppel as a result of the acquittal at the second trial, the State could claim collateral estoppel as a result of the conviction at the first trial. (3) This results in a "double collateral estoppel" which estops Simpson from claiming collateral estoppel at the third trial.

There are three reasons why the decision of the District Court of Appeal is in error. First, collateral estoppel is not mutually available to the State in a criminal case. Second, a reversed judgment cannot be the basis for collateral estoppel. Third, collateral estoppel was not timely raised by the State.

First, in *Ashe* this Court stated at 25 L.Ed. 2d, 469, 475:

> "As a rule of federal law, therefore, '(i)t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of *lack of 'mutuality'* . . ." (Emphasis added)

United States v. DeAngelo, 138 F.2d 466, (3rd Cir. 1943), states on page 468:

> "Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. United States v. Adams, 281 U.S. 202, 205, 50 S.Ct. 269, 74 L.Ed. 807. The matter is one of collateral estoppel of the prosecutor. Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. But a rule

> of evidence' has been recognized 'which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.'"

United States v. Carlisi, 32 F.Supp. 479, (E.D. N.Y. 1940), stated on page 482:

> "The courts have frequently referred to the principle of res judicata in criminal cases. In transplanting the doctrine, however, to criminal law the requirement of mutuality had to be abandoned. A prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt. People v. Kief, 126 N.Y. 661, 663, (27 N.E. 556); People v. Walker, 198 N.Y. 329, 334, (91 N.E. 806)."

Second, the term "collateral estoppel" refers to that aspect of res judicata which precludes the relitigating of particular issues in a subsequent action on a *different cause of action*. 46 Am.Jur. 2d, Judgments, Section 397 p. 565. In order for res judicata to apply there must be an *existing final judgment*. 46 Am.Jur. 2d Judgments, Section 394, p. 558, Section 457, p. 626. A judgment is inoperative as res judicata where it has been reversed. 46 Am.Jur. 2d, Judgments, Section 465, p. 633.

The conviction at the first trial was reversed and thereby rendered a nullity. The appellant was given a completely new trial. Even in a civil case where collateral estoppel does apply mutually, a reversed judgment is no longer a final judgment for res judicata.

Third. Even assuming the State could have raised collateral estoppel at the second trial, the fact is they did not. The doctrine may not be applied where the judgment is neither pleaded nor offered in evidence. 46 Am.Jur. 2d, Judgments, Section 580, p. 744.

Ashe incorporates collateral estoppel into the double jeopardy protection of the Fifth Amendment. It has been repeatedly held that immunity from double jeopardy is waived unless raised. *U.S. v. Hoyland*, 264 F.2d 346 (7th Cir. 1959), certiorari denied, 361 U.S. 845, rehearing denied, 361 U.S. 904.

Even if we reached the bizarre conclusion that double jeopardy inures to the benefit of the State it has nevertheless been waived since the State did not claim collateral estoppel at the second trial (or at any time until the opinion of the District Court of Appeal).

The argument that it is "unfair" to deny the State the mutual benefit of collateral estoppel can easily be resolved — when an accused is tried, *all* of the crimes arising out of *one* criminal transaction should be tried at *one* trial. Since there is only one trial, neither side can benefit from collateral estoppel.

This policy of *one* trial per criminal transaction has long been advocated by the federal courts. Its inherent fairness and obvious economies are undisputed. Nevertheless, this policy has been universally ignored by prosecutors. The reasons are twofold: (1) The first trial can serve as a dry run for the second prosecution. The State can examine the defendant's entire case and can prepare accordingly. (2) The more times the accused is required to "run the gantlet" the better the odds are for an eventual conviction. If the State loses before one jury, they have an opportunity to try again. Only one long term sentence is really needed.

Hopefully, the collateral estoppel doctrine will encourage prosecutors to try all of the crimes arising out of one transaction at one trial.

If we follow the reasoning of the District Court of Appeal to its logical conclusion, a defendant who allegedly robbed six persons in one holdup, and is tried for robbing the first victim and convicted, he must then be found guilty of all six robberies without further jury determination. It is suggested that this Court did not intend this result in *Ashe*. However, this and other miscarriages of justice may occur on a nationwide scale if the decision of the District Court of Appeals is permitted to stand.

Conclusion

Petitioner's trial and conviction was in violation of his constitutional rights against double jeopardy.

The writ of certiorari should be granted.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender
Counsel of Record
Duval County Courthouse
Jacksonville, Florida 32202

APPENDIX

JUDGMENT AND SENTENCE OF THE CRIMINAL COURT OF RECORD OF DUVAL COUNTY, FLORIDA

Case No. 68-3389

(Entered August 26, 1969)

Now again on this day came the State of Florida by T. Edward Austin as State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County; came also the defendant, Macio Bernard Simpson, in proper person; Whereupon, the defendant, Macio Bernard Simpson, was adjudged by the Court to be guilty of the offense of Robbery, as charged in the information herein; as found by the Jury; and the said defendant being asked by the Court if he had anything to say why the sentence of the law should not be passed upon him and saying nothing sufficient; It Is, thereupon, considered by the Court and it is the sentence of the law and the judgment of the Court that you, Macio Bernard Simpson, be delivered by the Sheriff of Duval County, Florida, to the proper officer of the State Prison of the State of Florida, there to be confined at hard labor for the full term and period of THIRTY (30) YEARS;

And It Is Further Ordered by the Court that the defendant, Macio Bernard Simpson, is to be given full credit for all time served and unforfeited gain time on the previous sentence imposed by this Court on March 14th, 1967, in Case Number 66-3319, and the defendant, Macio Bernard Simpson, is also to be given credit on this sentence for the time spent in the Duval County Jail from November 9th, 1966.

DONE AND ORDERED in open court at Duval County, Florida, this the 26th day of August, 1969.

/s/ Warren A. Nelson
Judge

JUDGMENT OF THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

(Entered May 14, 1970, Rehearing Denied Aug. 4, 1970)

Reported at 237 So.2d 341

PER CURIAM.

Appellant seeks reversal of a conviction and thirty-year sentence imposed after a jury found him guilty of armed robbery of the Kozy Korner Sundries Store in Jacksonville, Florida, on November 9, 1966.

The principal question raised by appellant is the sufficiency of the evidence to prove his identity as being one of the two persons who committed the crime charged. Our review of the evidence presented to the jury leads us to conclude that the evidence presented a fact question for the jury which resolved the same adversely to the appellant.

We have examined the remaining point raised relating to the instruction given to the jury and find the same to be without merit. See Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1941).

Appellant having failed to demonstrate reversible error, the judgment and sentence herein appealed is affirmed.

CARROLL, DONALD K., Acting C. J., and WIGGINTON and SPECTOR, JJ., concur.

ON PETITION FOR REHEARING

SPECTOR, Judge.

Appellant has filed a petition for rehearing, pro se, asserting that this court failed to consider the doctrine of collateral estoppel as elucidated by the United States Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. In Ashe, the court held that where a previous judgment

of acquittal was based on a general verdict, the federal rule of collateral estoppel requires the court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and to conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. By its decision in Ashe, the United States Supreme Court amended the Fifth Amendment of the Federal Constitution by engrafting upon the double jeopardy clause the federal procedural rule of collateral estoppel.

In reliance upon the holding in Ashe, appellant states that in July, 1968, he was tried on charges of committing a robbery at the Kozy Korner Sundries Store and was acquitted. Allegedly, the basis for acquittal in the July, 1968, trial was the State's inability to establish appellant's identity. Accordingly, appellant argues that if he could not be identified as the person who robbed Patricia Daniels, manager of the Kozy Korner Store, on November 9, 1966, and was acquitted of those charges because of such failure in proof, then the State is collaterally estopped from attempting to prove his identity as being the person who on the same night in question, November 9, 1966, committed a robbery upon one Willie D. Moore at the same time and place. At first blush, the case at bar seems to be on all fours with the circumstances presented in Ashe, and thus the doctrine of collateral estoppel superficially appears appropriate to this case. However, the trial held in July, 1968, on charges of robbing Patricia Daniels was the *second* trial on those charges. Said second trial resulted from a reversal by this court of appellant's conviction in 1967 on the same charges of which he was acquitted in July, 1968. Our opinion leading to said reversal is styled Jonathan Griffin and Macio Bernard Simpson v. State, rendered September 26, 1967, and reported at 202 So.2d 602. As can be seen on the face of said opinion, the reversal was based solely and ex-

clusively on the trial court's failure to instruct the jury on the lesser included offense of larceny as required by Hand v. State and Raulerson v. State, 199 So.2d 100 (Fla.1967). Thus it appears that this constitutes not the second but the third time appellant has been tried on charges arising from the robbery which occurred at the Kozy Korner Store on November 9, 1966. On the first occasion, in 1967, appellant was convicted. We have examined the record in the first appeal and it clearly appears that the appellant's identity and presence at the store on the night of the robbery was adequately established to the jury's satisfaction. Indeed, the sufficiency of the evidence to establish Simpson's identity as the robber was not even raised on the first appeal. The only issue raised was the failure to give the instruction on the lesser included charge; and, of course, the reversal was based only on that issue. So it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery.

In view of these circumstances, it hardly seems fair to permit appellant to place any greater reliance on the fact of his acquittal in 1968 than the State can place on the fact of the jury's guilty verdict in the 1967 trial. Clearly, this case emphasizes the vagaries of jury trials and serves to demonstrate the possible clay feet of the Supreme Court's decision in Ashe, supra. And, if collateral estoppel is permitted to operate in favor of one litigant, the same virtues should permit the doctrine to operate in favor of the other litigant.

If, as appellant contends, the searching question which led to his acquittal in the July, 1968, trial was the issue of identification, the equities are balanced against his reliance upon

the doctrine of collateral estoppel by reason of the jury's finding that appellant was one of the robbers in the 1967 trial.

Rehearing is denied and our original judgment of affirmance stands.

CARROLL, DONALD K., Acting C. J., and WIGGINTON, J., concur.

ORDER OF SUPREME COURT OF FLORIDA DENYING WRIT OF CERTIORARI

Case No. 40,191

(Entered October 30, 1970)

The Petition for Writ of Certiorari is denied on jurisdictional grounds but without prejudice to obtain review of the District Court of Appeal's opinion by certiorari direct to the Supreme Court of the United States.

ROBERTS, DREW, THORNAL, CARLTON and ADKINS, JJ., concur

ERVIN, C.J., and BOYD, J., dissent

MOTION OF PETITIONER TO QUASH

Case No. 68-3389

(Filed Sept. 25, 1968)

Comes now the Defendant, Macio Bernard Simpson, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and moves this Court to Quash the Information in this cause for the reason that to subject this Defendant to a trial in this case would be a deprivation of the rights of this Defendant as guaranteed to him by the Constitutions of the United States of America and the

State of Florida in that this Defendant was tried before a jury of his peers on July 9 and July 10, 1968 and was acquitted; that the acquittal in the aforementioned case is a bar to the prosecution attempted herein for the reason that the offense of which he is charged is substantially the same as the former offense for which he was acquitted and said offense arose out of the same occurrences and therefore are controlled by the doctrine of former jeopardy and res judicata.

WHEREFORE, the Defendant respectfully requests that the Information filed herein be quashed.

LOUIS O. FROST, JR.
PUBLIC DEFENDER

By: Leander J. Shaw
Assistant Public Defender

MOTION OF PETITIONER TO DISMISS
Case No. 68-3389
(Filed February 3, 1969)

COMES NOW the Defendant, MACIO BERNARD SIMPSON, by and through his undersigned attorney and files this his Mtoion to Dismiss the Information filed herein, and moves the Court to enter an order dismissing the said Information and releasing the Defendant, and as grounds therefor the Defendant respectfully shows as follows:

1. The Defendant was formerly tried in this Court under an information for robbery in case number 66-5319, and on July 9, 1968, this Defendant was acquitted by the jury as to the information for robbery charged in case number 66-5319, that at said trial, this Defendant's sole defense and the sole issue was that the Defendant was not present at the scene at the time of the alleged crime.

2. The Amended Information for Robbery is based on the same facts and circumstances and time as were tried in the previous case number 66-5319; and in the previous case, the said alleged victim in the subject case testified in the prior case, and in said prior case, the said alleged victim in the present case testified that he had been a victim also.

WHEREFORE, the Defendant moves the Court to dismiss this Information for the reason that the issue in this case was denied in the previous case; and therefore, the State is barred from presenting said issue in the present case by reasons of res judicata and/or estoppel by judgment in that it is an undisputed fact that the Defendant was not present at the time and place of the alleged act.

/s/ G. FRANK GODFREY
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No. 1267

MACIO BERNARD SIMPSON,

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-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

That portion of the petition pertaining to the jurisdictional and constitutional provisions involved is acceptable to the Respondent.

QUESTION PRESENTED

Did the Petitioner properly establish the existance of an estoppel requiring the application of the rule enunciated by this Court in Ashe v. Swenson, 397 U.S. 436, 1970.

STATEMENT OF THE CASE

The Statement of the Case as appears on page three of the petition filed herein is wholly unacceptable to the Respondent. Hence, the Respondent feels obligated to set forth its version of the facts of the case.

Petitioner, together with Raymond Rico Rivers and Jonathan Griffin, was tried and convicted of robbing one Patricia Daniels at the Kozy Korner, a convenience store in Jacksonville, Florida, on November 9, 1966. Petitioner and Griffin appealed said conviction to the District Court of Appeal, First District, claiming the Court erred in failing to grant an instruction on the lesser included offense of larceny. The District Court of Appeal, First District, reversed the convictions of Petitioner and Griffin and remanded the cause for a new trial. Griffin v. State, Fla.App. 1st 1967, 202 So.2d 602.

In July, 1968, the Petitioner was again tried on the charge of robbing Patricia Daniels, the manager of the Kozy Korner, and was apparently acquitted on that charge.

On May 28, 1969, Macio Simpson, the Petitioner, and Raymond Rico Rivers, the nonappealing defendant convicted in the original prosecution, were tried on the charge of robbing Willie D. Moore, a customer who was in the Kozy Korner the night Patricia Daniels was robbed.

Pat Daniels, the manager of Kozy Korner Sundries, located in Jacksonville, Florida, testified that on the evening of November 9, 1966, two men, one armed with a sawed-off shotgun and the other with a small pistol robbed the Kozy Korner. She testified that one man was tall and the other short and that the latter was wearing a dark colored bandana across his face and a hat. The witness testified that the Petitioner and his co-defendant, Raymond Rivers, were the two men that committed the robbery. This witness was positive as to the identity of Rivers, but the best identification she could make as to Petitioner was that he was "quite similar to him, very similar to him", although she saw him at a lineup within an hour after the crime and at that time there was no question in her mind that Petitioner and Rivers were the ones that committed the robberies. This witness also testified that after they took the money from the register the short man (Petitioner) took the wallet belonging to Willie D. Moore. The two men then directed everyone to lie on the floor and when they complied, Petitioner and Rivers fled from the store.

Mr. Moore testified that on November 9, 1969, he was in the Kozy Korner making a telephone call when two individuals robbed the store owner and took his wallet containing $20.00. Mr. Moore stated the short one, while holding the pistol on him, took his wallet, removed the money and threw the wallet on the floor. Mr. Moore's description of

Petitioner and Rivers coincided with Mrs. Daniels; however, he testified there was no doubt in his mind as to the identity of the robbers. Mr. Moore testified he followed the Petitioner out of the store down 9th Street and saw them turn the corner. He began to go back for his truck so that he could chase Petitioner when he saw a police car which he jumped into. He directed the police which way Petitioner and Rivers had gone. They found the men in the immediate area, at which time Mr. Moore saw Petitioner throw the bandana underneath the car. On cross-examination Mr. Moore testified Rivers did nothing or said nothing to him with respect to his wallet or money.

Archie Roper, a workman for Mr. Moore testified that he saw the defendants standing out in front of the Kozy Korner as he was walking to his truck and was able to clearly see Petitioner's face as the bandana or handkerchief was hanging to the side. Mr. Roper testified when he returned to the store from his truck and was about to go in he saw the hold-up taking place inside. Mr. Roper unequivocally identified the Petitioner as the man who held up the victim, Mr. Moore. As the witness left to go call the police, he noticed a patrol car approaching. He also went to the area where Petitioner and Rivers were taken into custody and testified there was no doubt in his mind that the men police arrested were the same men he saw at the store.

Patrolman J. T. Gay, one of the arresting officers, testified that he arrested Petitioner, Rivers and a third person on Wilcox Street near Eighth Street. Officer Gay, who retrieved the hat and bandana previously identified by the witnesses, Daniels, Moore and Roper, testified he saw the Petitioner place the hat and scarf under the automobile he was at when arrested. In the hat, Officer Gay found an undetermined amount of cash.

The Petitioner testified in his own behalf and said he had just gotten out of a taxi cab and was walking down the street when he saw several men running. He further related that the next thing he knew an officer was ordering him to halt as he was under arrest. He, of course, denied knowing Rivers and denied that he had robbed Willie Moore.

Raymond Rivers testified that on the night in question he "was at Ninth and Myrtel where [he] robbed the business establishment, which [he] was tried and convicted for. . .once before. . .."; however, he denied having robbed Moore the only crime which Petitioner and Rivers were then being tried for. Rivers testified that Petitioner was not with him at the time of the robbery but he was arrested later that night. Rivers testified a man by the name of Dennie Wilson was with him and was wearing a "goldish" colored handkerchief. Wilson, who was described as "six feet tall" was allegedly released by the police.

On rebuttal, Miss Daniels testified that Petitioner was only about five feet seven inches tall and apparently refuted the color of the bandana worn by the robber as testified to by Rivers. Archie Roper did also. Officer Gay testified the man he released was well dressed and was about five-seven or five-eight and not six feet tall.

The cause was submitted to the jury and they returned a verdict of guilty as charged against the Petitioner but found Rivers not guilty of robbing Willie Moore.

The Petitioner again instituted an appeal to the District Court of Appeal, First District, asserting as grounds for reversal: (1) that the Court erred in giving an instruction to the jury and (2) that the evidence was insufficient to support the conviction. Petitioner made no claim that he was subjected to double jeopardy. Indeed, such was never even assigned as error. See Respondent's Exhibit "A", App. p. 15.

After the District Court affirmed the judgment and sentence, Petitioner filed his petition for rehearing asserting, among other things, that he had been subjected to double jeopardy as defined by this Court in the Ashe case. The Respondent, pursuant to said petition, filed a response wherein it contended that the Petitioner had failed to demonstrate the existance of an estoppel by including in the record on appeal the transcript of the proceedings had in

July, 1968. See Respondent's Exhibit "B", App. p. 17. The Respondent, after noting the manner in which a Court must determine whether an estoppel does or does not, in fact, exist as enunciated by this Court in the Ashe decision, 397 U.S. at 444 and noting the Court did not have the trial transcript stated:

> "It is impossible for it [the Court] to ascertain whether the jury in the 1968 trial could have based its verdict on a basis other than that of petitioner-appellant's identity. Indeed, inasmuch as counsel for the petitioner at the trial raised this defense (TT 154), but did not include the transcript of the prior trial, it must presume that the prior acquittal did not forclose the point. This would also explain why counsel for the petitioner-appellant did not see fit to raise the matter on direct appeal."

Respondent concluded that the Petitioner had failed to demonstrate the existence of estoppel and that the Petition for Rehearing should be denied.

In due course, the District Court of Appeal rendered the decision sought to be reviewed wherein said Court denied Petitioner's Petition for Rehearing. Simpson v. State, Fla.App. 1st 1970, 237 So.2d 341. The Court, after review-

ing the background of the cause concluded: "...so it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery..." 237 So.2d at 342. (Emphasis supplied)

REASONS WHY THE WRIT SHOULD NOT ISSUE

Viewing the record as developed by the Petitioner, it seems rather apparent that his statement that "The only issue was the identity of the robber..." in all three trials is something which neither the Respondent nor the District Court of Appeal, First District, were able to ascertain in fact. Moreover, one must wonder at counsel's statement that he raised by assignment of error the complaint he now brings to this Court. As a matter of fact, it was not raised in the appellant's brief nor presented on oral argument, for indeed, in this case there was no oral argument. Of course, such may be regarded as trivia when we substitute allegations in lieu of fact properly presented and developed.

The Respondent suggests to this Court that Petitioner has still failed to demonstrate an Ashe estoppel and if this Court were to bring before it the complete record on appeal, it itself could not make the critical analysis required to determine if, in fact, such exists. In light of the deficiencies in this record, the Respondent suggests that whatever else may be said of the District Court's opinion, they were right in concluding that appellant was estopped "without further proof" from claiming an estoppel.

What must one presume from counsel's failure to produce the transcript of the prior trial other than that he cannot demonstrate that an examination of the prior record, including the pleadings, evidence and charge will reveal the verdict of the 1968 trial forclosed the verdict in the subsequent trial. Why does counsel go to such length to augur for a polity of one trial per criminal transaction --- a principle repudiated by this very Court in Ashe itself --- unless it is because he cannot support an estoppel upon an inspection of the record. Counsel suggests this is a fairer and easier method and that it does not require the accused "to run the gantlet." One might well ask whether Petitioner found it distasteful to run a gantlet a second time which resulted in the acquittal or was it only the third trip which he found offensive? If counsel was geniunely interested in but a single trial, the Respondent wonders why Petitioner did not file the appro-

priate motion to consolidate the informations for trial, which is his for the asking, under Rule 1.190(k), Florida Rules of Criminal Procedure. Could it have been that he did not wish to have all the charges tried simultaneiously? Surely it must appear to this Court that your Petitioner is asking for "the best of both worlds." Respondent is of the view that when counsel failed to move for a consolidation of the charges, he waived any right to claim an acquittal in the prior case constituted an estoppel in the subsequent case. U. S. v. Hoyland, 7th Cir. 1959, 264 F.2d 346. This is not to suggest --- as Petitioner would make this Court think --- that he may not maintain in the subsequent prosecution that he was not present when the crime was committed. Indeed, he was permitted to do so. What it simply means is that the prior finding of fact cannot be impleaded as a bar against a contrary finding of fact. If there be a suggestion that at the time the cause came on for trial, counsel could not anticipate this Court's newly announced rule with respect to State trials, and thus, could not intelligently waive this right, Respondent points out that long prior to the prosecution of this case, the District Court of Appeal, First District, recognized the principle of res judicata and/or collateral estoppel as being applicable in criminal proceedings. Busbee v. State, Fla.App. 1966, 183 So.2d 27.

In conclusion, Respondent's position is that the Petitioner has utterly

failed to demonstrate not only to the District Court of Appeal, First District, but to this Court as well, that an estoppel, in fact, existed forclosing the prosecution. Had he done so and the District Court blindly ignored that which he would be entitled to under this Court's pronouncement in Ashe, then a substantial federal question would truly exist. Inasmuch as he has not done so and cannot in the record presented to the District Court of Appeal, Respondent maintains he has not shown the existence of such a question. Accordingly, the Respondent urges the Court to decline to exercise its jurisdiction to review this matter further.

CONCLUSION

Petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

Counsel for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Honorable Louis O. Frost, Jr., Public Defender, Duval County Courthouse, Jacksonville, Florida 32202, via U. S. Mail, this ___ day of April, 1971.

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

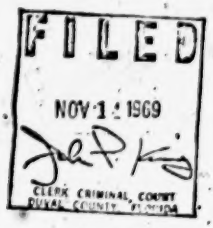
Counsel for Respondent

APPENDIX

APPENDIX A

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 68-3389 DIVISION C



STATE OF FLORIDA,

vs.

MACIO BERNARD SIMPSON

ASSIGNMENTS OF ERROR

Comes now the defendant, Macio Bernard Simpson, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and assigns the following errors upon which he intends to rely in the District Court of Appeal, First District, as grounds for appealing the verdict returned May 29, 1969, and the judgment and sentence imposed August 26, 1969, in the above styled cause, to-wit:

1. The Court erred in denying the defendant's motion for directed verdict at the close of the State's case.

2. The Court erred in denying the defendant's motion for directed verdict at the close of all the evidence.

3. The Court erred in denying the defendant's Motion for New Trial.

4. The trial Court erred in overruling the appellant's objection to a leading question, to-wit: "But now it is not processed, is that it?"

5. The trial Court erred by giving the "dynamite charge" when it was not requested by either party, objected to by the defendant and when the jury had only been out for one and one-half hours.

LOUIS O. FROST, JR.
PUBLIC DEFENDER

By Barry S. Scott
Assistant Public Defender

I HEREBY CERTIFY that a copy of the foregoing Assignments of Error has been furnished to Honorable T. Edward Austin, State Attorney for the Fourth Judicial Circuit of Florida, by hand, and Honorable Earl Faircloth, Attorney General for the State of Florida, by mail, this 14th day of November, 1969.

Barry S. Swift

Gerald Sohn
Assistant Public Defender

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MACIO BERNARD SIMPSON,
Appellant,
-v- CASE NUMBER M-259
STATE OF FLORIDA,
Appellee.

RESPONSE TO PETITION FOR REHEARING

Comes now the appellee, the State of Florida, by and through its undersigned counsel, pursuant to this Court's order of July 17, 1970, and files this its response to the petition for rehearing filed by the appellant, Macio Bernard Simpson, in the above-styled cause.

As the record on appeal now exists, the petitioner has not established his entitlement to reversal of judgment and sentence.

Although this Court does have before it the testimony of proceedings taken in the Criminal Court of Record in and for Duval County, Florida, of February 16, 1967, in the case of State of Florida versus Raymond Rico Rivers, Macio Bernard Simpson, and Jonathan Griffin, case number J-85, wherein said appellant was found guilty of robbery of the Kozy Korner, it does not have before it the testimony taken on or about July 9, 1968, wherein appellant was allegedly acquitted of having robbed said Kozy Korner. Petitioner-appellant's original conviction was reversed by this Court on September 26, 1967, on the sole ground that the trial court failed to instruct the jury regarding the lesser included offense of larceny. Griffin v. State, (Fla.App.1st 1967),

202 So.2d 602. In the case of Ash v. Swenson, ___ U.S. ___, 25 L.Ed.2d 469, decided April 6, 1970, relied upon by petitioner herein, it was stated:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' 25 L.Ed.2d at page 475, 76.

This Court not having before it the transcript of the proceedings had in July, 1968, it is impossible for it to ascertain whether the jury in the 1968 trial could have based its verdict on a basis other than that of petitioner-appellant's identity. Indeed, inasmuch as counsel for the petitioner at the trial raised this defense (TT 454), but did not include the transcript of the prior trial, it must presume that the prior acquittal did not forclose the point. This would also explain why counsel for the petitioner-appellant did not see fit to raise the matter on direct appeal.

In any event, the petitioner-appellant has failed to demonstrate the existence of an estoppel by the prior criminal proceedings as required under Ash v. Swenson. Accordingly, the petition for rehearing should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Rehearing has been forwarded to Honorable Gerald Sohn, Assistant Public Defender, Fourth Judicial Circuit, Duval County Courthouse, Jacksonville, Florida, by mail, this ___ day of July, 1970.

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

OF COUNSEL FOR APPELLEE

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Supreme Court, U.S.
FILED
APR 27 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender

Counsel for Petitioner
Duval County Courthouse
Jacksonville, Florida 32202

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

REPLY TO RESPONDENT'S REASONS
WHY THE WRIT SHOULD NOT ISSUE

The Response to Petition for Writ of Certiorari does not address itself to the issues raised in the Petition or to the decision to which certiorari is sought. Instead, Respondent raises two points which at best are immaterial.

The first point is that the question of estoppel was not raised in the original assignment of errors. However, as the Respondent points out the Petitioner, in proper

person, did assert the issue of double jeopardy as defined by, Ashe. Whether the District Court of Appeal, First District, State of Florida, could have refused to consider this question is moot since they did in fact accept jurisdiction and ordered the State to respond to the Petition for Rehearing. (See Exhibit A) Nothing in the decision of the District Court even remotely suggests that they were denying the appeal on procedural grounds. Petitioner could submit voluminous arguments that the question of double jeopardy, was properly raised; however, such would be irrelevant and immaterial since the District Court did accept jurisdiction and consider the point on its merits.

The second point raised by Respondent is that the District Court could not determine whether estoppel applied since they did not have the record of the earlier trial. Petitioner would take issue with this allegation; however, again we submit that this point is moot since there is nothing in the decision of the District Court to even remotely suggest this argument. The District Court clearly pointed out that the case "seems to be on all fours with the circumstances presented in Ashe." The District Court indicated that the doctrine of collateral estoppel would apply but for the fact that the trial wherein the Petitioner was acquitted was the "second" trial and that he had been previously convicted at the "first" trial.

Respondent refers to the phrase "without further proof" and implies that the District Court was basing their decision on the absence of facts which would support a finding of collateral estoppel; however, Respondent has taken this phrase out of context. The full sentence involved is:

> "So it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery." (Emphasis added)

Their decision is based on the "double collateral estoppel doctrine" rather than the argument suggested by Respondent.

Accepting the Respondent's position at face value, the opinion of the District Court should at least be reversed as to the doctrine of "double collateral estoppel" and remanded for further determination consistent with the Ashe decision. If the District Court finds it necessary to further review the record of the "second" trial, it can make this determination at the appropriate time.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Certiorari has been forwarded to Honorable Robert L. Shevin, Attorney General for the State of Florida, The Capitol Building, Tallahassee, Florida 32304, via U.S. Mail, this 26th day of April, A.D. 1971.

GERALD SOHN
Assistant Public Defender
Duval County Courthouse
Jacksonville, Florida 32202

Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1970

MACIO BERNARD SIMPSON,
Appellant,
-vs-
STATE OF FLORIDA,
Appellee.

CASE NO. M-259

O R D E R

SUA SPONTE IT IS ORDERED that the State is respectfully requested to respond to the Petition for Rehearing filed in this cause in pro per within fifteen (15) days subsequent to the date of this order.

WITNESS the Honorable Dewey M. Johnson, Chief Judge, and Seal of the Court this 17th day of July, A. D. 1970.

Clerk

A True Copy

ATTEST:

Clerk, First District Court of Appeal
Tallahassee, Florida

SIMPSON *v.* FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 1267. Decided June 14, 1971

A store manager and a customer were robbed by two armed men. Petitioner was tried and convicted of robbing the manager, but on retrial after reversal he was acquitted. He was then charged with robbing the customer, his motion to quash the information on double jeopardy grounds was overruled, and he was found guilty. Each jury verdict was a general one. The District Court of Appeal, after the decision in *Ashe* v. *Swenson*, 397 U. S. 436, held as a matter of law that, while the acquittal at the second trial entitled petitioner to invoke collateral estoppel, his conviction at the first trial gave rise to a "double collateral estoppel," allowing the State to rely on the finding of the jury at the first trial that he was a participant in the robbery. The State Supreme Court denied review. *Held*: As stated in *Ashe*, *supra*, "mutuality" is not an ingredient of the collateral estoppel rule imposed on the States by the Fifth and Fourteenth Amendments; and unless the jury verdict in the second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose from consideration" the double jeopardy provision vitiates petitioner's conviction.

Certiorari granted; 237 So. 2d 341, vacated and remanded.

PER CURIAM.

On November 9, 1966, two armed men entered a store in Jacksonville, Florida, and robbed the manager and a customer. During 1967 petitioner was tried and convicted in the state courts, after a jury trial, of the armed robbery of the manager, but the conviction was reversed on appeal because the trial judge neglected to instruct the jury on the lesser included offense of larceny. *Griffin* v. *State*, 202 So. 2d 602 (Fla. Dist. Ct. App. 1967). In 1968 petitioner was retried on the same charge and acquitted. Subsequently, he was charged with robbing the customer. His motion to quash the information on

double jeopardy grounds was overruled and a jury found petitioner guilty of armed robbery. Each of the three jury verdicts here involved was a general one. The trial court imposed a 30-year sentence and petitioner appealed to the District Court of Appeal.

Prior to the adjudication of petitioner's appeal, this Court rendered its decision in *Ashe* v. *Swenson*, 397 U. S. 436. We there held that the principle of collateral estoppel, which "bars relitigation between the same parties of issues actually determined at a previous trial," *id.*, at 442, is "embodied in the Fifth Amendment guarantee against double jeopardy," *id.*, at 445, and is fully applicable to the States, by force of the Fourteenth Amendment, in light of *Benton* v. *Maryland*, 395 U. S. 784.

The factual situation presented in *Ashe* remarkably parallels that of the instant case. There three or four men had interrupted a poker game and robbed all six participants. Petitioner had been acquitted by a general jury verdict on a charge of robbing one of the poker players, but was later tried and convicted of robbing a second. He contended that the prohibition against double jeopardy operated as a bar to the second prosecution because the only issue in each trial was the identity of the robbers. We held in *Ashe* that

> "Where a previous judgment of acquittal was based upon a general verdict . . . [the rule of collateral estoppel] requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe, supra*, at 444.

Here, as in *Ashe*, petitioner contends that his identity as one of the robbers was the sole disputed issue at each of his trials. The District Court of Appeal, however,

declined to examine the record of the second trial, but simply held instead, as a matter of law, that while defendant's acquittal at the second trial entitled him to invoke collateral estoppel, his conviction at the first trial (where the sufficiency of the evidence was not disputed on appeal) gave rise to a "double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on . . . the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery." *Simpson* v. *State*, 237 So. 2d 341, 342 (Fla. Dist. Ct. App. 1970).

The Supreme Court of Florida, by a divided vote, declined review, and petitioner filed a timely petition for a writ of certiorari with this Court. We grant the writ and we vacate the judgment.

The ground upon which the state court resolved petitioner's contention is plainly not tenable. Indeed, in *Ashe* itself, we specifically noted that "mutuality" was not an ingredient of the collateral estoppel rule imposed by the Fifth and Fourteenth Amendments upon the States. *Ashe*, *supra*, at 443. It is clear that Florida could not have retried petitioner a third time on the charge of robbing the store manager simply because it had previously secured a jury verdict of guilty as well as one of acquittal. And, had the second trial never occurred, the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night. It must, therefore, be equally clear that unless the jury verdict in the second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose

from consideration" the constitutional guarantee against being twice put in jeopardy for the same offense vitiates petitioner's conviction.

The judgment of the Florida District Court of Appeal is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins.

The robbery of the manager and the robbery of the customer grew out of one criminal episode. I agree with the Court's disposition but, for the reasons stated in my concurring opinion in *Ashe* v. *Swenson*, 397 U. S. 436, 448 (1970), I would also hold that on the facts of this case the Double Jeopardy Clause prohibited Florida from prosecuting petitioner for the robbery of the customer.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons given in the dissenting opinion of THE CHIEF JUSTICE in *Ashe* v. *Swenson*, 397 U. S. 436, 460.